

MELBOURNE CONCEPT PROFIT SHARING TRUST  
JOSEPH F. FIATO  
CARL GERARD

IBLA 79-383

Decided February 28, 1980

Appeal from decision of Wyoming State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease W 61318 and holding that lease to have terminated.

Affirmed.

1. Oil and Gas Leases: Reinstatement

Under 30 U.S.C. § 188(c) (1976), the Secretary of the Interior has no authority to reinstate an oil and gas lease terminated by operation of law for failure to make timely payment of rental, unless rental payment is tendered at the proper office within 20 days after the due date.

2. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals --  
Oil and Gas Leases: Termination

The Secretary may reinstate a lease terminated by operation of law for failure to pay on or before the anniversary date the full amount of rental due where it is shown to the satisfaction of the Secretary that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee. 30 U.S.C. § 188(c) (1976). Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2).

Where the failure to pay rental on or before the anniversary date of a lease is attributable to a computer error in the mailing system, neither reasonable diligence nor justification is shown to support a petition for reinstatement.

3. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rental

Reliance on receipt of a courtesy notice from the Bureau of Land Management does not justify late payment and therefore permit reinstatement of an oil and gas lease terminated for failure to pay rental timely.

APPEARANCES: Craig R. Carver, Esq., Head, Moye, Carver & Ray, Denver, Colorado, for appellants.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Melbourne Concept Profit Sharing Trust, Joseph F. Fiato, and Carl Gerard appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), dated April 5, 1979, denying their petition for reinstatement of oil and gas lease W 61318 and holding that lease to have terminated.

The lease in question issued effective February 1, 1978, for a period of 10 years to Carl Gerard and Joseph F. Fiato. Payment of the rental was due on February 1 of each year. The address appearing on the drawing entry card was that of a lease filing service, Stewart Capital Corporation. On February 3, 1978, BLM received a letter carrying facsimile signatures of the two lessees requesting that the address of the lease be changed from that of Stewart Capital to the following: "Mr. Carl Gerard, 22 Creekside Lane, Rochester, NY 14618; Mr. Joseph F. Fiato, 52 Briarhill Rd., Orchard Park, NY."

In its decision, BLM stated that its computer center was notified that the courtesy notice of payment due and receipt for payment should be mailed to Carl Gerard at the Rochester address. BLM explained that the mailing address did not change even though a portion of the lease was assigned to Melbourne Concept, Inc., which in turn assigned the same portion to appellant Melbourne Concept Profit Sharing Trust.

BLM mailed a courtesy "Notice of Payment Due" to Mr. Gerard approximately 45 days before the rental due date. BLM said this notice was not returned. On January 15, 1979, BLM received a check from appellant for \$320, which amount was half of the total amount due, \$640. On January 25, 1979, BLM mailed the "Receipt for Payment" to Mr. Gerard acknowledging the \$320 rental payment, but that receipt was returned to BLM by the Postal Service with the notation, "Return

to Sender -- Not Deliverable as Addressed -- Unable to Forward." On February 1, 1979, the lease terminated by operation of law under 30 U.S.C. § 188(b) (1976) for failure to pay the annual rental on or before the anniversary date of the lease. Appellant received notice of the termination of the lease and deficiency in payment on March 16, 1979. Appellant filed its petition for reinstatement of the lease pursuant to 30 U.S.C. § 188(c) (1976), along with a check for the balance of the rental payment, on April 2, 1979.

In its decision denying the petition for reinstatement, the State Office explained that the check received from Melbourne Concept, Inc., for \$320 was deficient by 50 percent, so a notice of deficiency was not sent to the lessees, as the deficiency was not considered to be "nominal" in accordance with 43 CFR 3108.2-1(b) which states in part: "A deficiency will be considered nominal if it is not more than \$10 or five per centum (5 percent) of the total payment due, whichever is more." Since the rental payment of \$320 did not fall within the scope of the exception allowed by 43 CFR 3108.2-1(b), BLM held that the lease terminated by operation of law as of February 1, 1979. The State Office held that reliance on receipt of a courtesy billing notice from BLM, like reliance on a notice of deficiency, is without legal basis, and the fact that a lessee did not receive a courtesy notice can neither prevent the lease from terminating nor serve to justify a failure to pay timely the lease rental. The State Office emphasized that it is under no obligation to send courtesy notices and noted that the receipt for payment which would have alerted the lessees of the deficiency was returned. The State Office held that the fact that the lessee did not receive a courtesy notice does not justify failure to pay the full amount of the rental within the time required. The State Office further found that reinstatement could not be granted because the rental was not paid within 20 days of the due date as required by 30 U.S.C. § 188(c) (1976).

In their statement of reasons, appellants assert they meet the requirements of 30 U.S.C. § 188(c) (1976) permitting reinstatement because they maintained a comprehensive leasing system utilizing computer services to insure timely payment of all rentals; that this system has performed flawlessly for 5 years; that in the instant case the system triggered payment of part of the rental well in advance of the due date, but for an unexplainable reason the computer system misinformed appellants of the proper amount due. Appellants argue the failure to pay was therefore justifiable, and that due diligence was exercised. They cite as precedent Ram Petroleum, Inc. v. Andrus, 478 F. Supp. 1165 (D. Nev. 1979), in which the court granted reinstatement where failure to make a rental payment timely was due to an employee's inadvertent failure.

[1, 2] The requirements for reinstatement are set forth in 30 U.S.C. § 188(c) (1976) which reads in pertinent part as follows:

[W]here any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee, the Secretary may reinstate the lease if --

(1) a petition for reinstatement, together with the required rental, including back rental accruing from the date of termination of the lease, is filed with the Secretary; \* \* \*.

The language of this provision clearly states that in order for a petition for reinstatement to be granted, the rental must be paid within 20 days of the due date. Lease W 61318 was issued February 1, 1978, and payment was due on or before February 1 each year. The 20-day period expired February 20, 1979, and full payment did not occur until April 2, 1979. The Board has consistently held that the Secretary has no authority to reinstate a terminated lease unless payment has been tendered within 20 days of the due date, as the statute only empowers him to reinstate leases so paid and none other. Sigmund Matejko, 43 IBLA 96 (1979); Beatrice G. Wood, 42 IBLA 148 (1979); John A. Steele, Jr., 41 IBLA 49 (1979). Therefore, even if the "justifiable" and/or "due diligence" requirements were met, the lease may not be reinstated.

But, we find that if the rental had been paid within the 20-day grace period required, appellant's failure to make timely payment does not meet the requirements of being justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976). Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). Here, half of appellants' payment was not sent until almost 2 months after the due date. Mailing the payment after it is due does not constitute reasonable diligence. Gilbert Mark Castillo, 36 IBLA 32 (1978); Apostolos Paliombeis, 30 IBLA 153 (1977); Bobbie Arnold, 24 IBLA 352 (1976).

Similarly, the fact that appellants have business procedures which normally insure prompt rental payments does not establish that they have exercised reasonable diligence in a particular case. Fuel Resources Development Co., 43 IBLA 19, 21 (1979); Phillips Petroleum Company, 29 IBLA 114, 117 (1977). The unexplained error in appellants' computer system does not justify late payment. In order for the failure to pay rental timely to be justifiable, the failure must be caused by factors outside the lessee's control which were the proximate cause of the failure. Robert H. Schnurbusch, 44 IBLA 229 (1979); Emma Pace, 35 IBLA 143 (1978). Also, the Board has held

repeatedly that a lessee may not rely upon the bulk and/or complexity of its business organization so as to make "justifiable" an action which would not be held to be justifiable for an individual lessee. Fuel Resources Development Co., supra at 23; Mono Power Co., 28 IBLA 289, 291 (1976). Appellants are ultimately in control of and are responsible for the performance of the business machines they use.

[3] Appellants' failure to make timely payment is not justified by the fact that they received no courtesy notice from BLM. As explained by BLM, the courtesy notice was sent to Mr. Gerard, consistent with its policy of sending the notice to the leaseholder having the greatest interest. Even if a courtesy notice had not been sent, appellants would not have been relieved of their obligation to make timely payment. Lack of a courtesy notice from BLM does not justify late payment. The courtesy notice is merely a reminder that rental is due and reliance on the receipt of a notice does not justify a failure to pay the rental timely. William A. Klug, 43 IBLA 255 (1979); Gilbert Mark Castillo, supra.

We shall not apply Ram Petroleum, Inc., supra, as a precedent for the instant case because it is distinguishable on its facts. As for Ram Petroleum, Inc. v. Andrus, supra, we note that there is a split of authority between two courts. Although the United States District Court for the District of Nevada reversed the Board's decision, the United States District Court for the District of Utah affirmed it in Ramoco v. Andrus, Civ. No. C 79-0007 (D. Utah November 14, 1979).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Anne Poindexter Lewis  
Administrative Judge

I concur:

Frederick Fishman  
Administrative Judge

ADMINISTRATIVE JUDGE GOSS CONCURRING:

Full payment was not tendered within 20 days of the due date. I concur that under 30 U.S.C. § 188(c) (1976) the Board has no authority to reinstate the lease.

Joseph W. Goss  
Administrative Judge

